TAN SRI ABDUL RAHIM DATUK THAMBY CHIK

v.

JOHN MARCOM & ORS (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
RAHMAH HUSSAIN J
[CIVIL SUIT NO: S4-23-51-98]
25 OCTOBER 1999

CIVIL PROCEDURE: *Jurisdiction - High Court - Foreign defendant - Service of writ of summons - Whether conferred jurisdiction on High Court to try proceedings against defendant - Whether cause of action arose within jurisdiction of court - Courts of Judicature Act 1964, s. 23(2)*

The plaintiff commenced an action against the defendants for defamatory allegations in respect of the plaintiff published in an article in the TIME Magazine, Asian Edition ('TIME Magazine'), a magazine published and distributed in Malaysia. The defendants applied to set aside the action. The Senior Assistant Registrar allowed the said application in respect of the 1st, 2nd and 3rd defendants but dismissed it against the 4th defendant. Hence, the instant appeal by the 4th defendant.

The 4th defendant argued that: (i) the mere service of the writ of summons on him did not automatically confer jurisdiction on the High Court to try the proceedings against him; and (ii) that the cause of action did not arise within the local jurisdiction of the court.

Held:

[1] Service is not the sole basis of jurisdiction. By virtue of s. 23(2) Courts of Judicature Act 1964, the High Court has jurisdiction over those served with proceedings whilst they are in Malaysia even if their presence is temporary in nature.

[2] The plaintiff in his statement of claim pleaded that the TIME Magazine was a magazine which was published and distributed in Malaysia pursuant to a publication permit and that the article was published by the 4th defendant. The 4th defendant did not challenge that the article written by him was published in Malaysia and that he knew and intended the article to be published in Malaysia.

[Appeal dismissed.]

Case(s) referred to:
American Express Ltd v. Mohamed Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 ***(refd)***
HRH Maharanee Seethadevi Gaekwar Of Baroda v. Wildenstein [1972] 2 QB 283 ***(refd)***
Lee Teck Chee & Anor v. Merril Lynch International Bank Ltd [1998] 4 CLJ 188 ***(refd)***
Malayan Banking Berhad v. International Tin Council And Another Appeal [1989] 2 CLJ 961 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 23(1), (a) (2), 24
Rules of the High Court 1980, O. 12 r. 7(1)

Other source referred to:
Halsbury's Law of England, vol 28, p 17

For the plaintiff - Firoz; M/s Puthucheary Firoz & Asmet
For the 4th defendant - Darryl Goon; M/s Raja, Darryl & Loh

Reported by Usha Thiagarajah

JUDGMENT

Rahmah Hussain J:

On 11 December 1998 the learned Senior Assistant Registrar dismissed the application to set aside the writ of summons against the fourth defendant pursuant to O. 12 r. 7(1) Rules of the High Court 1980.

The fourth defendant submits that the basis of his application is that the court has no jurisdiction to try this proceeding as against him.

The writ of summons dated 1 August 1998 was served on the fourth defendant whilst he was in Malaysia on 24 September 1998. It is argued on behalf of the fourth defendant that the mere service of the writ on the fourth defendant in Malaysia does not automatically confer jurisdiction on the High Court of Malaya. Learned counsel also argued that the High Court of Malaya does not have civil jurisdiction to try this proceeding against him as it does not come within the ambit of ss. 23(1), 23(2) or 24 of the Courts of Judicature Act 1964 ('CJA').

It is further submitted that s. 23(1)(a) of the CJA sets out a test on whether the cause of action has arisen within the local jurisdiction of the court. He says, it is clear from the statement of claim that the nature of the cause of action is libel which arises when an allegedly defamatory statement is published to a third party. Furthermore, s. 23(1)(a) of the CJA does not apply to the fourth defendant because the plaintiff has not pleaded that the

publication of the allegedly defamatory article in The TIME Magazine containing the same was made by the fourth defendant within the local jurisdiction of the High Court, *ie*, West Malaysia. Neither is there any evidence to show that the fourth defendant published the said article in West Malaysia. According to the fourth defendant, all he did was to write the article in question in Jakarta, Indonesia and to send a draft of it to Hong Kong.

To support his argument learned counsel for the fourth defendant referred to the case of *Lee Teck Chee & Anor v. Merril Lynch International Bank Ltd* [1998] 4 CLJ 188 wherein Kamalanathan Ratnam J held that:

> Since publication is vital to sustain a charge of defamation and since s. 23(1)(a) CJA requires the "cause of action" to have occurred in Malaysia, the Plaintiffs must show publication within the jurisdiction in order to be able to maintain this claim in Malaysia.

On the other hand learned counsel for the plaintiff submits that in paras. 4 and 5 of fourth defendant's affidavit affirmed on 9 October 1998 (encl. (7)), the fourth defendant admitted he was the author of an article entitled *How Malaysia Throttles Dissent* which was published at p. 26 of The TIME Magazine on 15 June 1998. The article was written by fourth defendant who intended its publication in Malaysia and elsewhere as stated at para. 6(iii) of plaintiff's affidavit [encl. (11A)]. This fact was not disputed by the fourth defendant. Learned counsel for the plaintiff continues by saying that this court has jurisdiction over the fourth defendant on the ground that the defendant was present within its jurisdiction when service was effected upon him. He cites the case of *HRH Maharanee Seethadevi Gaekwar Of Baroda v. Wildenstein* [1972] 2 QB 283 whereby Lord Denning MR (as His Lordship then was) stated (at p. 292):

> If a Defendant is properly served with a writ while he is in this country, albeit on a short visit, the Plaintiff is *prima facie* entitled to continue the proceedings to the end. He has validly invoked the jurisdiction of the Queen's courts; and he is entitled to require those courts to proceed to adjudicate upon his claim.

Now the law in Malaysia in respect of jurisdiction over a defendant served with proceeding in Malaysia has been considered on several occasions by the Malaysian courts. In the case of *American Express Ltd v. Mohamed Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273; [1995] 1 MLJ 160 Peh Swee Chin FCJ (as His Lordship then was) at p. 166 stated:

> In a case like the present one, involving some foreign elements, the question that normally first of all arises, is whether our courts have jurisdiction, *ie*, the power to deal with the case.

> At common law, it would mean that a Malaysian court would have jurisdiction over foreign defendant if he is present in Malaysia. If he is not present in Malaysia, the Malaysian court would still have jurisdiction, if the foreign defendant has submitted to jurisdiction, *ie*, he has submitted to being sued in Malaysia.
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> If neither such defendant can be served in this country, because he is not present here nor has he submitted to jurisdiction, then the Malaysian court can assume statutorily such jurisdiction over the foreign defendant under Order 11 r. 1 of the Rules of the High Court 1980 (hereafter called the 'RHC') as the conferment of such jurisdiction is implicit in connection with the granting of leave by the High Court for service out of jurisdiction, etc. There is no need to go further in this case by referring to the relevant provisions of the Courts of Judicature Act 1964, etc. for source or origin of such statutory jurisdiction.

The other case cited by learned counsel with regard to the issue of jurisdiction is *Malayan Banking Berhad v. International Tin Council And Another Appeal* [1989] 2 CLJ 961; [1989] 3 MLJ 286 Mohamed Azmi SCJ (as His Lordship then was) stated:

> Service is not solely the foundation of our High Courts. Apart from Order 11 r. 1 of the Rules of the High Court 1980, s. 23(1)(b) of the Courts of Judicature Act 1964 provides extra-territorial jurisdiction to the High Court in cases where foreigners overseas are sued as co-defendants with local residents.

From the abovesaid statement it is thus clear that service is not the sole basis of jurisdiction and that statute has now conferred extra-territorial jurisdiction to the courts. Section 23(2) of the Courts of Judicature Act 1964 provides the legal basis for it. It provides as follows:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have such jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction.

The approach of interpreting the CJA was laid down by Mohamed Azmi SCJ in the *Malayan Banking Berhad's* case *(supra)* (at p. 288) which is:

> In interpreting Section 23(1)(b) of the Courts of Judicature Act, we must in general assume that the legislature knows the then existing state of the law on the jurisdiction of the High Courts under the Courts Ordinance 1948, and in construing an Act of Parliament where the words used by the legislature are precise and unambiguous, then the literal and strict construction rules should apply ...

Therefore by virtue of the aforegoing, I agree with learned counsel for the plaintiff's submission that the position in respect of the High Court prior to Malaysia Day was that the service upon a defendant present in Malaysia was

sufficient to confer jurisdiction on the High Court. After Malaysia Day, by virtue of s. 23(2) of the Courts of Judicature Act 1964, the High Court continued to exercise its jurisdiction over those served with proceedings whilst they were in Malaysia even if their presence was temporary in nature.

With regard to the argument by learned counsel for the fourth defendant, as to the place where the cause of action arose, the plaintiff submits that the tort of defamation is committed where the defamatory publication is read, seen or heard. The fourth defendant as the author of the article is thus liable for its publication on the basis of the principles of joint publication and/or authorised repetition. The cause of action in respect of the fourth defendant arose in Malaysia because the article was written by him with the intention and knowledge that it would be published in Malaysia.

In support learned counsel for the plaintiff referred to *Halsbury's Laws Of England*, vol. 28 at p. 17 where it was stated:

> The publisher – As a general rule the person to be sued as the defendant in an action of libel or slander, or to be prosecuted on an indictment for a libel, is he who published the defamatory statement or caused it to be published. Every person who participates in the publication may be liable as a publisher.
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> Joint and several liability ... Thus, if a libel appears in a newspaper, the author of the libel and the proprietor, editor, printer, publisher and vendor of the newspaper are *prima facie* jointly and severally liable.
>
> Responsibility of the writer of a libel for its publication – Although writing is not in itself publication, the writer of a libel must be taken to understand what he has written, and he ought to do all he can to prevent it being made known to a third person.
>
> Liability of original publisher on republication ... If a defendant requests another to publish defamatory matter, and gives him a written statement of it for that purpose, whether in full or in outline, and the agent publishes that matter adhering to the sense and substance of it, although the language is to some extent his own, the defendant is liable as the publisher. The test is whether or not the defendant authorised the repetition in a written form or it can be inferred from the surrounding circumstances that he anticipated and wished his words to be repeated in that form.

Now in this case the plaintiff has at paras. 2 & 5 of the statement of claim pleaded that The TIME Magazine is a magazine which is published and distributed in Malaysia pursuant to a Publication Permit PP676/11/98 and that the article was published by the fourth defendant. The fourth defendant on the other hand did not challenge that the article written by him was published in Malaysia and that he knew and intended the article to be published in Malaysia.

Therefore based on the facts and the pleadings in this action, I was of the opinion that this court has jurisdiction over the fourth defendant. As such I dismissed the appeal with costs.